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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 95.

AMERICAN ICE COMPANY AND WILLIAM G. JOHNSON, ASSIGNEE, *Appellants,*

vs.

EASTERN TRUST AND BANKING COMPANY, *Appellee.*

BRIEF FOR APPELLANTS.

WM. G. JOHNSON,
Counsel for Appellants.

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vs.

EASTERN TRUST AND BANKING COMPANY, *Appellee.*

STATEMENT OF THE CASE.

This is an appeal from a decree of the Court of Appeals of the District of Columbia (Rec., p. 132), affirming with modifications a decree of the Supreme Court of the District of Columbia (Rec., p. 121) in a suit for the foreclosure of a mortgage.

The Eastern Trust and Banking Company, appellee in this court, was appellee in the court below and complainant in the original proceedings in the Supreme Court of the District of Columbia, in which proceeding the appellants in this court were defendants.

For the sake of brevity the appellant, American Ice Company, will be hereinafty styled the Ice Company, the appellant, William G. Johnson, Assignee, the Assignee, and the appellee, Eastern Trust and Banking Company, the Trustee, for such it was in the mortgage to which reference is hereinafter made.

On December 2, 1889, the Ice Company, a corporation

organized under the laws of Maine, executed a mortgage to the Trustee, a corporation under the laws of Maine, to secure certain bonds of the Ice Company in the sum of $40,000 (Rec., pp. 21–29).

By said mortgage the Ice Company undertook to convey to the Trustee certain property on the Penobscot river in the State of Maine, and also certain property in the city of Washington, opposite square two hundred and seventy in said city, and lying between said square and the Potomac river (Rec., pp. 23–24) in trust—

> "for the equal pro rata benefit and security of the holders of the above mentioned bonds at whatever period the same may be issued without any preference or priority of one bond over another and for the uses and purposes hereinafter declared" (Rec., p. 25).

It is further provided in said mortgage that in the event of default by the Ice Company under the mortgage that the Trustee shall have the right to sell the whole or any part of the property—

> "at *public auction* in said Bangor, upon such terms as to credit, partial credit and security for payment as it may think proper or expedient, having first given public notice of the time and place of the sale or sales by advertisement printed not less than once a week for at least four successive weeks in one or more newspapers printed and published in said Bangor and also in Washington aforesaid" (Rec., pp. 25–26).

The deed also gives to the Trustee authority to adjourn any such advertised sale from time to time, in its discretion, giving reasonable notice of each adjournment, and after so adjourning, *to make the sale at the time and place to which the same may be adjourned* (Rec., p. 26).

It is further provided that:

> "Any sale made as aforesaid shall be a perpetual bar both at law and in equity against the American

> Ice Company and all persons claiming by, through or under it, from claiming the property, rights, interest and franchises so sold, or any interest therein. And for the purposes aforesaid the party of the second part and its successors in the trust are hereby constituted irrevocably the attorney of said American Ice Company" (Rec., p. 26).

The Ice Company also covenants in said mortgage—

> "To keep said premises and property at all times insured in such insurance companies as may be approved by the trustee in such amounts as shall reasonably protect all the insurable property, payable in case of loss to the trustee as its interest may appear" (Rec., p. 27).

It also contains a provision that—

> "The trustee shall not be liable for any neglect, mismanagement or misfeasance of any of its or their agents, attorneys or servants in relation to taking possession of, controlling, operating, managing *or selling* the premises or property aforesaid when said agents and servants have been selected with reasonable care" (Rec.. pp. 27–28).

The bonds secured by the mortgage were one hundred and seventy-six in number, fifty-six in the sum of five hundred dollars each and one hundred and twenty in the sum of one hundred dollars each, all of said bonds being made payable to the Trustee in the mortgage or bearer (Rec., pp. 21, 22).

As appears by the mortgage deed the property in the District of Columbia was acquired by the mortgagor, the Ice Company, from one Edward M. Willis, on December 2, 1889 (Rec., pp. 24–25). The mortgage deed contains no covenants of warranty as to the title, although, as appears by the averments of the bill, the property was included in the claim of the Government in what is known as the Potomac Flats Case (Rec., p. 8).

On the 13th of October, 1893, the Ice Company executed and delivered in due form of law a deed of assignment of all of its property to William G. Johnson, the Assignee, in trust for the equal benefit of all of its creditors (Rec., p. 4).

On the 30th of July, 1894, the Trustee served a landlord and tenant notice upon the assignee and his tenant Willis, demanding the delivery of the possession of the property in Washington to the Trustee, and subsequently on the 8th of September, 1894, undertook to sell the Washington property to a committee of persons acting for the bondholders secured by the mortgage (Rec., pp. 16–17).

The tenant of the Assignee having refused possession and filed a plea of title before the justice of the peace (Rec., pp. 12–13), the proceedings for possession were removed into the Supreme Court of the District of Columbia (Rec., p. 14), and were tried before Mr. Justice Bradley upon an agreed statement of facts (Rec. p. 15), who rendered judgment in favor of the Assignee (Rec., p. 32) for the reason set forth in his opinion (Rec., pp 33–36). From this judgment the Trustee took an appeal to the Court of Appeals (Rec., p. 32), which court reversed the judgment of the Supreme Court of the District of Columbia and entered judgment in favor of the Trustee on June 3, 1895 (Eastern Trust and Banking Company *vs.* Willis, 6 App. D. C. 375). This judgment was subsequently reversed by this court (Willis *vs.* Eastern Trust and Banking Company, 169 U. S. 295).

In November, 1895, the Assignee, being the grantee of the equity of redemption of the Ice Company and in possession of the premises as such grantee, took out fire insurance on the improvements on the property in Washington, as the owner of such equity of redemption, in the amount of $3,000 (Rec., pp. 7, 41).

On the 11th of February, 1896, the improvements covered by this insurance were destroyed by fire. The insurance companies denied all liability under their policies because at the time of issuing the same they were not advised of

the nature of said Assignee's title and of the incumbrance on the property, but subsequently voluntarily paid the amount to said Assignee (Rec., p. 38), who was at the time of the insurance and for some time theretofore had been and at the time of the fire was in possession of the said property covered by said insurance.

On the 25th of March, 1896, the original bill in this cause was filed (Rec., p. 1), in which the Trustee abandons the alleged sale of the property situated in the District of Columbia, of September 8, 1894, and seeks to have a foreclosure of the mortgage. In the 14th paragraph of said bill it is alleged that after default in the payment of the second instalment of bonds, and after the interest on the bonded indebtedness had continued unpaid for more than ninety days, the bondholders—

> "or those holding more than fifty per centum of the total face value thereof, directed the plaintiff company as trustee to proceed in the execution of said trust in accordance with the terms and provisions thereof. In pursuance of such direction and *in strict conformity with the terms of the power of sale contained in said mortgage*, said trustee advertised for sale and sold the property in said mortgage embraced and described at public auction at Bangor, Maine, on September 8th, 1894, to a committee acting for said bondholders" (Rec., pp. 4–5).

It is further averred in said paragraph that the portion of the real and personal property in Maine was sold for the sum of fourteen thousand dollars, and the property located in the District of Columbia for the sum of fourteen thousand seven hundred and fifty dollars (Rec., p. 5).

The said bill further avers that the said committee have never perfected their purchase of the Maine property and that no deed has passed to them, but that they are ready and tender themselves ready to comply with the terms of sale, and that the complainant is ready on its part and that *the said sale is in fact completed*, and that there will be real-

ized therefrom after deducting proper charges the sum of nine thousand one hundred and seventy-three dollars and sixty-eight cents to be credited upon the bonded indebtedness (Rec., p. 5).

The bill also avers that the sale of the Washington property—

> "Was made upon the condition and with the understanding between the purchasers and the trustee that the trustee should obtain for them possession of the property before the sale should be closed or considered complete" (Rec., p. 5).

The bill further avers that owing to the failure of the complainant to obtain possession of the real estate in Washington the purchasers had refused to comply with the terms of said sale and that said sale of said Washington property made at Bangor was therefore a nullity (Rec., p. 6).

The bill further alleges that the Assignee—

"*Acting for and in place of said American Ice Company*" (Rec., p. 7), procured policies of insurance against loss or damage by fire on part of the improvements of the real estate in Washington in three fire insurance companies in the sum of one thousand dollars each; that the said policies of insurance were in full force and virtue on the 11th of February, 1896, when the said improvements were totally destroyed by fire, and claims that the complainant is entitled to the proceeds of said policies by reason of the covenant for insurance in the mortgage deed (Rec., p. 7).

The bill further avers that the property in Washington is included in the claim of the United States Government in what is known as the Potomac Flats Case, in which said case the claim of title on the part of the Government had recently been sustained by the Supreme Court of the District of Columbia, and that an appeal had been taken—

> "On behalf of the parties in possession to the Supreme Court of the United States where the same is now pending; that at the time said mortgage was

executed said decision by the Supreme Court of the District of Columbia had not been made and that the effect thereof has been to greatly diminish, if not to destroy, the marketable value of the property affected, and, if said decision is affirmed by the Supreme Court of the United States, will render parties in possession liable to eviction by the United States" (Rec., pp. 8–9).

The bill prayed for the appointment of a receiver, that the defendant, Assignee, be required to account to the complainant for the rents of the property, that the complainant as Trustee be declared entitled to the proceeds of the insurance policies upon the improvements; for the foreclosure of the mortgage and sale of the Washington property, and for general relief (Rec., pp. 9–10).

The answers of the Ice Company and the Assignee, so far as material to be considered here, denied knowledge of the amount of the indebtedness due under the mortgage and required proof thereof (Rec., p. 39, 40, 45). They also denied all knowledge of the alleged sale of the property in the State of Maine and demanded strict proof thereof (Rec., p. 40, 45). They also denied that the Assignee had taken out insurance in pursuance of the mortgage for the benefit of the Trustee, but on the contrary averred that the Assignee had merely taken out insurance upon his separate interest as owner of the equity of redemption for the benefit of all the creditors of the Ice Company, secured and unsecured (Rec., pp. 38, 41, 46, 47).

The answer of the Assignee further sets up that the insurance was not taken out until after the Trustee had claimed to have extinguished the mortgage by a sale of the property (Rec., p. 47).

The answers of said defendants admit that in the case of the United States *vs.* Morris et al., commonly known as the Potomac Flats Case, a decree of the Supreme Court of the District of Columbia had adjudged the title to the real estate in Washington, embraced in the mortgage, to be the prop-

erty of the United States and that an appeal from that decree had been taken to this court. The said defendants averred that the Trustee had never taken any steps in said litigation to maintain its alleged title to the property in these proceedings and had failed to contribute to any of the cost of the litigation or in any way to defend the title in said proceedings, although requested so to do; and that the whole cost and labor of the defense of the property in said proceedings had been borne exclusively by the Assignee (Rec., pp. 43–48).

The said answers also averred that by the proceedings of the Trustee and the bondholders the title of the defendant Assignee to all of the property in Maine had been defeated, so that as such Assignee he had recourse only to the property in Washington, while the Trustee as mortgagee had recourse to both properties; and the answers also averred that the defendants were entitled to have the assets marshalled, and that before the Trustee could have recourse to the property in Washington it should bring in for resale the property in Maine in the interest of all of the creditors (Rec., pp. 44–48, 49).

The cause came on for final hearing before Mr. Justice Cox in March, 1898, when a decree was entered (Rec., pp. 74–76), by which the court denied the application for a receiver; denied that the complainant was entitled to the proceeds of the insurance taken out by the defendant as Assignee on his equity of redemption in the improvements; decreed the amount of the indebtedness due under the mortgage, and a sale of the premises.

From this decree the Trustee and the defendants, the Ice Company and the Assignee appealed to the Court of Appeals (Rec., p. 76).

Upon that appeal the Court of Appeals affirmed so much of the decree of Judge Cox as denied the appointment of a receiver and an accounting of the rents, but reversed so much of the decree as adjudged the insurance money to the

defendant Johnson, as assignee of the equity of redemption, and also reversed so much of the decree of Judge Cox as found the amount of indebtedness, and directed that the cause be remanded for an accounting with respect thereto. The Court of Appeals affirmed the right of the complainant to a foreclosure and a sale of the property, but directed that (App. to Rec., p. 18):

> "The sale of the property, however, under any decree that may be passed should not be allowed to be made until after the case of Morris and others *vs.* United States, known as the Potomac Flats Case, now pending in the Supreme Court of the United States shall have been decided; for otherwise the sale of the property made subject to the final decision of that case, could not be other than a mere speculation and would most likely result in obtaining nothing more than a mere nominal sum."

After the cause was remanded to the Supreme Court of the District of Columbia by the Court of Appeals, and on August 29, 1899, depositions were taken by the Trustee (Rec., pp. 81–108), and on September 27, 1899, on motion of the Trustee, the cause was referred to the auditor "to ascertain and report the amount due on the bonds secured by the deed of trust in these proceedings described" (Rec., p. 108).

On the 7th of February, A. D. 1900, on motion of the Trustee, the foregoing order was amended so that the auditor was directed—

> "to state the account of complainant, as trustee, under the deed of trust in complainant's bill described, and to ascertain and report the amount of the indebtedness still due upon said bonds under said trust" (Rec., p. 109).

On March 23, A. D. 1900, the auditor filed his report (Rec., pp. 109–118), to which no exceptions were filed by any of the parties to the cause. On the 24th of April, A. D.

1900, the complainant, by an order to the clerk, directed the cause to be calendared for hearing at the next (May) term (Rec., p. 119).

No notice of this order to calendar was given, as required by equity rule sixty-four of the Supreme Court of the District of the Columbia, and the appellants had no knowledge of the order until May 9, A. D. 1900 (Rec., p. 120).

On May 14, A. D. 1900, the appellants moved the court to strike the case from the calendar and for leave to take testimony (Rec., pp. 119–120), which motion was not granted, but was overruled by the final decree (Rec., p. 121), from which an appeal was taken by the Ice Company and the Assignee to the Court of Appeals (Rec., p. 123).

On January 9, 1901, the Court of Appeals affirmed the decree of the Supreme Court of the District of Columbia, except as to the amount of the indebtedness due on the mortgage, which it reduced to the sum of $26,282.86 (Rec., p. 132).

From this decree the Ice Company and the Assignee prosecuted their appeal to this court (Rec., p. 132).

ASSIGNMENT OF ERRORS.

I.

The court erred in decreeing the proceeds of the insurance policies to the complainant.

II.

The court erred in not remanding the cause to the court below for further proceedings in that court, because the decree of that court was passed prematurely and without right, the cause having been calendared for hearing without notice and heard before the same was at issue and ready for hearing.

III.

The court erred in decreeing a sale of the property pending further proceedings in the cause of the United States *vs.* Morris, known as the Potomac Flats Case.

IV.

The court erred in not requiring the complainant to make contribution to the costs of the litigation affecting the title to the property in the case of United States *vs.* Morris, commonly known as the Potomac Flats Case, and in not remanding the cause for proof on that subject.

V.

The court erred in not dismissing the bill, because of the inequitable conduct of the Trustee in the attempted execution of the trusts.

I.

The Court Erred in Decreeing the Proceeds of the Insurance Policies to the Complainant, Trustee.

The deed of trust contained a covenant on the part of the mortgagor, the Ice Company, to keep the property insured to the satisfaction of the mortgagee, the indemnity if any to be paid to the mortgagee as interest may appear, and by the mortgagee to be applied *at its option*, either to the restitution or repair or extension of the improvements, or to be invested and held as security for the debt, or applied to its liquidation (Rec., p. 27).

The insurance policies were not taken out by the mortgagor, nor upon the mortgagor's interest, but only upon the equity of redemption owned by the Assignee (Rec., pp. 38, 47).

The Assignee, representing general creditors and being the owner in fee of the equity of redemption had an insurable interest in the property separate and distinct from that of the Trustee under the mortgage and it was that interest which the Assignee undertook to insure.

In the case of Insurance Co. *vs.* Stinson, 103 U. S. 25, a creditor of the mortgagor claiming a mechanic's lien on the mortgaged premises took out insurance upon this property for his own benefit. Suit was brought upon the policy, and this court in its opinion thus states the instruction given by the court below (p. 27):

> "The court further instructed the jury in substance that if the plaintiff had such builder's lien when the policy was effected, which could have been enforced by the decree of the appropriate court, and by virtue of which he could have recovered the equity of redemption on that property, then he was entitled to recover, without regard to the question what his equity of redemption might or might not have realized at an auction sale; that if a party has a valid and subsisting second security for a given amount, and he enters into a contract of indemnity against the destruction of that security, and a loss by fire occurs, both parties having full knowledge of the state of the property and the title when the contract is entered into, such insurance would cover that second security, although by the subsequent course of events the older and prior security might have swept away the value of the second."

Commenting thereon the court says (p. 28):

> "As to the other question, relating to the insurable interest of the plaintiff, we think that the charge given was equally free from exception. There is no doubt that the owner of the property had an insurable interest to the extent of the value of the building notwithstanding the existence of a mortgage on the property of sufficient amount to absorb it."

And in summing up this branch of the case, the court says (p. 29):

> "The principle asserted in these remarks, as well as the reason of the thing, leads to the conclusion that the owner of an equity of redemption has an insurable interest equal to the value of the insurable property embraced therein, whether he is personally liable for the mortgage debt or not. His interest arises from his ownership, carrying with it the incidental right of redeeming the property from the incumbrances on it. If he is also personally liable for such incumbrances, it only makes his interest more direct and exacting."

In United States *vs.* American Tobacco Company, 166 U S. 468, this court reaffirmed that ruling, saying (p. 479):

> "An owner has an insurable interest in his property to the extent of the value of the building on it, notwithstanding the existence of a mortgage on the property sufficient to absorb it. Per Bradley, J., in Insurance Co. *vs.* Stinson, 103 U. S. 25, 29; May on Insurance, Secs. 81, 82. The amount of interest or its character is not material in determining the question whether a party who attempts to recover under a policy has an insurable interest."

In the case of Wheeler *vs.* Insurance Company, 101 U. S. 439, Johnson & Goodrich, creditors of a mortgagor who had, in his mortgage, covenanted to insure for the benefit of the mortgagee, but had not so insured, insured the mortgagor's equity of redemption for their own benefit, charging the insurance premiums to the mortgagor. The mortgagees claimed the insurance fund; but this court held that the creditors had the right to take out such insurance for their own benefit and to satisfy their debt from the proceeds in advance of the mortgagees.

In Wainer *vs.* Milford Mut. Fire Ins. Co., 153 Mass. 335, the court states the doctrine of insurable interest thus (p. 341):

> "Insurance against loss by fire is a personal contract of indemnity. If a person has such an interest in property that he will suffer pecuniary loss by its destruction, he has an insurable interest."

At the time of the insurance and of the fire the assignee in this case was in possession of the property on which the insurance was effected and of its rents and profits (Rec., pp. 6, 7).

That possession was adjudged rightful by this court.

> Willis *vs.* Eastern Trust and Banking Co., 169 U. S. 295.

The rightfulness of his perception of the rents and profits was also sustained by Justice Cox in the Supreme Court of the District (Rec., p. 75) and by the Court of Appeals (Appendix to Rec., p. 11).

The assignee being the grantee of the equity of redemption, rightfully in possession and rightfully in the reception of the rents and profits, obviously had an insurable interest, distinct from that of the mortgagee, and the Supreme Court of the District, by Mr. Justice Cox so decreed (Rec., p. 75).

The Court of Appeals, however, reversed this ruling upon the grounds set forth in its opinion on the first appeal (Rec., p. 131, Appendix to Rec., pp. 11–17).

In that opinion the Court of Appeals say (App. to Rec., p. 12):

> "It is certainly true, that Johnson does not occupy the position of a *bona fide* purchaser without notice. He is in the shoes of the Ice Company, and can occupy no better position than the assignor itself, with respect to the property assigned. His relation to the assignor is of a representive nature. By taking the assignment for the benefit of all the creditors, he did not extinguish or modify the covenant to insure, nor did he relieve the property of the charge to sustain, at all times, the insurance on the property for the protection and as an additional security of the

> bonds held under the mortgage. . . . The property itself was charged with the obligation of maintaining the insurance, and Johnson taking the property in his representative capacity, and placing himself in the position of his assignor, took the property *cum onere*."

It may be freely admitted that so far as his title to the real estate is concerned the assignee stood in the place, by representation, of his grantor. But he also represented creditors, unsecured as well as secured, *with respect to funds upon which the mortgagee had no lien under the mortgage*, and it is submitted that with those funds he could do, for the benefit of the creditors, anything which they could do for themselves.

This court has held, as shown in the cases cited above, that a creditor has an insurable interest in the equity of redemption of his debtor's mortgaged estate. If the creditors had this interest and could lawfully insure the same, why could not the assignee do so for them? He is certainly their representative, and exclusively their representative as to funds not impressed with the lien of the mortgage.

The theory upon which the learned Court of Appeals denied this right to the creditors acting through their representative, the assignee, is, that the mortgagor's covenant to insure is a covenant *running with the land*, and upon the conveyance of the land to the assignee he became charged with the fulfillment of that covenant, the court saying (App. to Rec., p. 17):

> "*If the covenant runs with the land, as the authorities would seem to make clear*, and the assignee took the property subject to that charge, though he may have taken out the policies for the professed benefit of all the creditors, including bondholders, yet, *by force of the covenant*, the bondholders are entitled to priority in the application of the fund. We are of opinion, therefore, that the court below was in error in denying the right of the bondholders to this insurance fund."

It is respectfully submitted that in this the Court of Appeals was in error.

The covenant in this case is exclusively for the benefit of the covenantee, the mortgagee, and in no sense for the benefit of the estate. The money realized from such insurance is to be paid over to the mortgagee to be applied at *its option*, either to restoration or *additions* to improvements or *applied to the mortgage debt.*

Under this covenant, the mortgagee is in absolute control of the insurance money and can apply every dollar to the mortgage debt, leaving the mortgagor nothing with which to rebuild or repair.

As the estate of the mortgagor could derive no benefit from the insurance and the contract of insurance is itself a personal contract of indemnity against loss to the *person* and not the *thing* damnified, it seems clear, upon principle, that this covenant has none of the attributes of a real covenant or one "running with the land."

> "A covenant to insure, with a stipulation that in case of damage by fire the money to be recovered from the insurance office shall be laid out in rebuilding or repairing the premises, clearly falls within the rule laid down in Spencer's case (5 Co. 117) concerning covenants running with the land. The effect of such an insurance is not merely to put in the pocket of the person insuring, in the event of loss, the amount of the money secured, but to entitle the owner of the estate to have that money expended on the land; and if such be the operation of the covenant, it does affect the thing demised, as much as a covenant to repair or rebuild in case of damage by fire."
>
> Platt on Covenants, 183.

> "No case has decided that a mere covenant to insure, unattended by a clause for reinstating the premises with the insurance money will run with the land." Ib. 185.

> "In order then to bring a covenant within the first of these rules, it is obvious that the insurance

money must be rendered available to rebuild or repair the premises injured by fire." Ib. 186.

"If the covenant can run with the land at all it must possess that property *at law*, independently of any assistance which equity may be disposed to render a landlord. The interest derivable under the policy would, in this view of the case, constitute a fund for the mere personal advantage of the insured (The Saddler's Company *vs.* Babcock, 2 Atk. 554). Now if the insurance money be a personal compensation, and if there be not any means to secure the application of that money for the benefit of the estate, it is difficult to conceive on what grounds a general covenant to insure can be deemed to be comprehended within the above rules relating to covenants running with the land." Ib. 187.

"In framing a covenant to insure, the precaution of inserting a provision that the money recoverable from the insurance office *shall be applied* in repairing or rebuilding the premises injured or destroyed by fire, *should never be neglected*." Ib. 188.

In Cushing *vs.* Thompson, 34 Maine, 496, the court say (p. 499):

"It is well settled, that a contract of insurance does not run with the estate, as incident thereto, but is an agreement with the underwriters against a loss, which the *assured* may sustain, and not the loss which *another* may be subjected to, having an interest as mortgager, redemptioner, or otherwise."

Another essential element of a covenant runing with the land is that it shall continue to attend the estate in all its alienations and that its performance by one alienee shall not be abrogated by the mere fact of alienation. Yet such would be the effect upon insurance of the alienation by the party assured.

In Carpenter *vs.* The Providence Washington Insurance Company, 16 Pet. 495, Mr. Justice Story says (pp. 501–2):

> "If then, a mortgagor procures a policy on the property against fire, and he afterwards assigns the policy to the mortgagee with the consent of the underwriters (if that is required by the contract to give it validity) as collateral security, that assignment operates solely as an equitable transfer of the policy so as to enable the mortgagee to recover the amount due in case of loss; but it does not displace the interest of the mortgagor in the premises insured. On the contrary the insurance is still his insurance, and on his property, and for his account. And so essential is this, that if the mortgagor should transfer the property to a third person, without the consent of the underwriters, so as to divest all his interest therein, and then a loss should occur, no recovey can be had therefor against the underwriters, because the assured has ceased to have any interest therein, and the purchaser has no right or interest in the policy."

It is respectfully submitted, therefore, that upon principle, a covenant to insure, unless upon the express obligation of both parties and not at the option of either, that the insurance be expended in repairs (in which case it is a covenant to repair by particular means) is not one running with the land, but lacks the essential elements of such a covenant.

That covenants to insure, merely, are not covenants running with the land has been expressly decided by the Court of Appeals of New York in two well considered cases in which that exact question was presented.

In the case of Dunlop *vs.* Avery, 89 N. Y. 592, Chapman W. Avery, in December, 1870, executed a mortgage to Robert Dunlop for $2,000, with a covenant to insure the property in that amount and to assign the policy to Dunlop. The insurance was effected and the policy made payable to Dunlop and this condition maintained until November 16, 1874, when the policy expired. Avery then secured a new policy for $3,000 in his own name and did not assign to Dunlop. In March, 1875, Avery executed a second mortgage conveying his equity of redemption to his brother,

Egbert I. Avery, to secure Egbert I. Avery $1,400, and had the $3,000 policy indorsed "Loss, if any, payable to Egbert I. Avery, as his interest may appear." On the expiration of this policy Chapman W. Avery obtained a new policy for $2,000, payable to himself and indorsed "Loss, if any, payable to Egbert I. Avery, as his interest may appear."

The premises were destroyed by fire, and Dunlop, the first mortgagee, claimed the insurance by virtue of the covenant in his mortgage.

The Supreme Court gave judgment in favor of Dunlop, (23 Hun. 509); but the Court of Appeals reversed this decision, saying (p. 599):

> "Nor is there any force in the position that the covenant to insure runs with the land, and hence no assignment was required of the policy. In re Sands, 3 Bissell, 175, so far as it upholds such a doctrine it is not, we think, well founded. The covenant in question is *entirely personal in its character, does not affect the land or run with it and is collateral and incidental* to the remaining covenants in the mortgage. A conveyance of the land by the mortgagor *would not, we think, render the vendee liable on the covenant.*"

In Reid *vs.* McCrum, 91 N. Y. 412, Donald & Waddell, owners, had executed a mortgage to secure Reid. The mortgage contained a covenant by the mortgagors to keep the buildings insured for the benefit of the mortgagee and the policies to be assigned to him. The mortgage was duly recorded.

Subsequently they sold the property, *subject to the mortgage* and by mesne conveyance, all "in terms subject to the mortgage," McCrum became the owner of the equity of redemption and insured the property for his own benefit, but did not assign the policies to Reid. A fire occurred, and Reid set up claim to the insurance by force of the covenant in his recorded mortgage.

Counsel for Reid assailed the decision in Dunlop *vs.*

Avery, 89 N. Y. 592, as being unsound in principle and as mere *obiter*. The Court of Appeals, however, sustained and reaffirmed the doctrine in Dunlop *vs.* Avery, saying (p. 416):

> "In the case of Dunlop *vs.* Avery (89 N. Y. 592), it was held that a covenant to insure contained in a mortgage was not a covenant running with the land; that it was entirely personal in its character and did not affect the land and was collateral and incidental to the remaining covenants in the mortgage. That decision is a complete answer to the claim made by the appellant's counsel, that the covenant to insure contained in the mortgage in this case runs with the land, and the question must be regarded as *res adjudicata*, unless some reason exists why the case cited should not be followed and adhered to. Authorities are cited in support of that decision, and no doubt is expressed in the opinion in regard to the correctness of the rule there laid down, nor is there, we think, any ground for claiming that the question at issue was not involved in that case, as the point was distinctly presented, and if the covenant to insure was a covenant running with the land, then the plaintiff was clearly entitled to recover."

The court then proceeds to show that the decision in Dunlop *vs.* Avery was not *obiter* and says (p. 417):

> "Assuming, however, that the question is before us we are of the opinion, after an examination of the elaborate brief of the counsel for the appellant and the authorities cited, that the covenant in question did not run with the land. . . .
>
> (p. 418) "*A careful examination of the authorities presents no case where it has been distinctly held that a simple covenant of insurance runs with the land.*"

In the opinion delivered by the court below in this case, on the first appeal, a number of cases are cited as supporting the doctrine that this covenant is one running with the land and therefore binds the grantee of the equity of redemption, but it is respectfully submitted, with great defer-

ence to that court, that no one of the cases cited supports its position.

In Vernon *vs.* Smith, 5 Barnew. & Ald. 1, cited by the court below (App. to Rec., pp. 13, 14) the covenant to insure was not in a mortgage, but in a *lease*.

The controversy was not between a mortgagee and mortgagor or the grantee of his equity of redemption, but was an action by the *assignor of a lessor* against a *lessee* for breach of the lessee's covenant to insure.

Abbott, C. J., Bayley, Holroyd and Best, JJ., all delivered separate opinions, and *each one* grounds his opinion that the covenant in the lease was one running with the land upon the *express provisions of the statute* of 14 Geo. III, Chap. 78, which gave the owner of the land in such cases *the absolute right to have the insurance money laid out in rebuilding the premises.*

Moreover, the assignee, claiming the benefit of the covenant was not the assignee of the *land*, as in the case at bar, but the assignee of the *covenant itself*, namely of the *lease*.

There is a very obvious and palpable difference between the assignee of land *subject* to a mortgage containing covenants and the assignee of a *lease* containing covenants. The one is a conveyance of land which may or may not be bound by the covenants, and the other is the transfer of a contract, in part composed of the covenants.

In the case of Thomas' Administrators *vs.* Vonkapff's Executors, 6 Gill & J., p. 372, cited by the Court of Appeals (App. to Rec., p. 14), Thomas gave a mortgage of certain real estate to secure Vonkapff $20,000 and in the deed covenanted to keep up fire insurance on the improvements to the extent of $19,000,

> "and that in case of loss the sum insured *shall be immediately applied to the rebuilding, replacing and putting the said property and premises in the like good order and condition that the same now are in,*" etc. (p. 378).

Thomas, the mortgagor and covenantor, did take out in-

surance to the amount of $10,000; the premises were destroyed, and he deposited the insurance money with the Maryland Savings Institution with a memorandum in writing, signed by him saying (p. 374):

> "It is my intention this sum should remain in your institution until I can decide upon whether I shall have to use it for the rebuilding of my sugar refinery establishment, or have to transfer the same to the executors of the estate of B. J. Vonkapff for the payment of a mortgage held by this estate on my property."

Thus it will be seen that *Thomas, the mortgagor, took out the insurance himself, recovered the money and deposited the very check for the insurance money, impressed with an express trust in writing that it be applied for the use of the mortgagee, either in rebuilding under the covenant or as a payment on account of the mortgage debt.*

Having covenanted to insure for the benefit of the mortgagee, and having actually done so and received the insurance money, the money was in equity fettered with the trust for the mortgagee and his memorandum with the deposit, but expressed what the law imposed.

There is no room for doubt that when the mortgagor covenants to insure for the benefit of the mortgagee and does so, the insurance is additional security for the debt and belongs to the mortgagee.

It is true that the court in that case speaks of the covenant to insure as one "running with the land" because there was in the covenant the *absolute obligation to repair and rebuild*, but this was mere *obiter*. There were no facts in the case calling for the announcement or application of that principle. Thomas had not aliened the land, but owned it after the fire and up to the foreclosure sale. Had Thomas aliened the land and had his alienee taken out insurance in his own name for his own benefit as an insurance of his equity of redemption, and the mortgagee sought the benefit of such

insurance there might have been occasion to consider and determine that question, and in that connection the unconditional obligation to rebuild would have been, perhaps, controlling, but under the existing facts the question did not arise as a point for decision in the case.

Before alluding to the subject of covenants running with the land the Court of Appeals of Maryland had already sustained the right of the mortgagee upon two equally controlling grounds, each of which arose upon the record of the case before it. The question of covenants running with the land did not rise in the case and no facts existed upon which it could be raised. No conveyance of the land had been made and no person as heir or devisee of the mortgagor was before the court whom the decision of that question could in any respect bind or affect.

The proceeding was between the administrators of Thomas, the original mortgagor and covenantor, and the executors of Vonkapff, the original mortgagee and covenantee, concerning a sum of money collected by the covenantor in his lifetime as the results of his covenant performed, and by him expressly dedicated to and specially deposited for the benefit of the covenantee.

In the case of In re Sands Ale Brewing Co., 3 Biss. 175, cited by the Court of Appeals (App. to Rec., p. 16), the Brewing Company executed a mortgage for sixty thousand dollars, in which, among other things, the company covenanted to keep the improvements insured for the benefit of the mortgagee and to have the loss, if any, made payable to the trustee in the mortgage. In compliance with the covenants the mortgagor took out insurance and had the policies assigned to the trustee. When they expired new policies were taken out *by the mortgagor* but not assigned to the trustee. On the 9th of October, 1871, the buildings were destroyed by fire, the mortgagor being the owner in possession and being in possession of the policies of insurance taken out by it. *After the fire* the mortgagor became insol-

vent and these *very policies of insurance taken out by the mortgagor in pursuance of its contract*, passed by the assignment to its assignee in bankruptcy.

Here, then, it is obvious, no question as to the covenant running with the land arose. The *covenant had been performed* by the covenantor, the assignor ; the property had been insured and the fire occurred, before the assignment and the only question was whether insurance effected *by the covenantor in pursuance of the covenant* could be diverted by an assignment made after the fire.

When a covenant has been performed by the original covenantor, no question can arise as to whether an assignee of the land is also bound to perform it. The covenant was already satisfied, and the observation of the court that the covenant was one running with the land was mere *obiter*.

The true principle controlling that case, it is submitted, was the rule that equity treats as done that which is agreed to be done. The company had agreed to take out policies, and agreed to assign them to the mortgagor. It had taken them out, but had failed to assign them; but for all legal effects they were to be treated as though they had been assigned ; and the correct principle of decision in the case was expressed by Judge Blodget in that portion of the opinion in which he says (p. 180):

> "My conclusion then is, that the covenant by the bankrupt to insure operated to assign in equity to the petitioner the benefit of any insurance *effected by the bankrupt* on the mortgaged property."

Had the covenantor in that case failed to take out insurance, and had the insurance been effected by the assignee, in his own name, the question whether the covenant was one running with the land might have arisen for decision. On the facts as they existed it plainly did not arise.

In Miller *vs.* Aldrich, 31 Mich. 408, cited by the Court of Appeals (App. to Rec., p. 16), one Chapman, being in-

debted to Miller, *orally agreed* to give a mortgage on real estate and as the land alone was insufficient also *orally agreed* to keep the building insured for Miller's benefit. Chapman actually took out insurance for the full value of the property for the benefit of the mortgagee. He subsequently aliened the property subject to the mortgage, and *upon a distinct agreement with the alienee, as part of the contract of sale, that the alienee would continue the insurance for the benefit of the mortgagee*, and turned over to his alienee the existing insurance policy, which was made payable to the mortgagee, and which had six years of the seven years of the mortgage yet to run. The alienee delivered up the policy to be cancelled and took a new policy in his own name; and subsequently, when the mortgagee expressed apprehension about his security, *assured the mortgagee that the property was insured for his benefit.*

It does not appear whether the mortgage contained any covenant to insure, but as appears by the opinion of Graves, Ch. J. (413): "The mortgage is not in evidence," and of course no question as to a covenant running with the land was decided or considered in the case. It did appear to the satisfaction of the court, that the *owner of the equity of redemption*, as a part of the contract of purchase, *agreed to insure* the mortgagee's interest and did receive an already existing policy therefor along with the property, that he acknowledged his agreement to the mortgagee and pretended that he had fulfilled it, thereby misleading the mortgagee into the belief that he had been and would continue to be secured in that way.

Cooley, J., in his opinion, says (p. 410):

> "Miller, when he was informed what had been done, called upon Aldrich and expressed apprehension about his security, but Aldrich quieted him by assuring him that in the event of loss he should be protected by the insurance money."

In Ellis *vs.* Kreutzinger, 27 Mo. 311, cited by the court

below (App. to Rec., 16), it appears, by the report that Kreutzinger gave Ellis & Cavender a *chattel* mortgage on his stock of goods, and that (p. 312):

> "Kreutzinger also *delivered to said firm as a security for said indebtedness a policy of insurance* on said stock of goods, executed in his favor by the St. Louis Mutual Fire and Marine Insurance Company of St. Louis."

Kreutzinger was also indebted to the firm of Douglass, Gazzam & Co., and to that of Fallenstein & Gauss. The goods were lost by fire. *After the loss* an assignment of the policy was made upon the books of the company to one Meyer in trust for the two firms last named.

Suit was brought by Ellis against Meyer, to whom the company had paid, and the two firms for whose benefit the assignment of the policy was made, and the court below refused to instruct the jury that possession of the policy by Ellis was notice of an equitable mortgage in their favor upon the policy itself.

The court, in its opinion, says (p. 314):

> "The authorities are very clear that *the deposit of a policy of insurance with a creditor of the assured as a security*, collateral or original, for the debt, *gives the creditor a lien on the proceeds of the policy*, which is binding upon the underwriters and upon the assured, and upon all those who take an interest from the assured with notice of such lien.
>
> . . . . . .
>
> "It is not necessary to say that the possession of the policy by the plaintiffs and the failure of the defendants to produce it, were of themselves notice to the company that it belonged to the plaintiffs or to some one else; but it would seem to be clear that these circumstances were sufficient to put the company and the defendants upon inquiry. The evidence was that both the company and the defendants were apprised that the policy was in the hands of the plaintiffs and that they claimed an interest in it."

In the case of Nichols *vs.* Baxter, 5 R. I. 491, cited in the opinion of the court below (App. to Rec., p. 16), Baxter had given Nichols a mortgage for two hundred and fifty dollars, and in the mortgage had covenanted to keep the premises insured in not less than that amount for the benefit of the mortgagee. At the time of executing the mortgage Baxter had an insurance policy for the amount of two hundred and fifty dollars for a term of seven years, the mortgage debt being payable in one year. Baxter never assigned the policy to the mortgagee. Subsequently the premises were destroyed by fire and the insurance company was ready to pay the loss to any one entitled to receive it. Baxter being called upon by Nichols, the mortgagee, to give him an order upon the insurance company for the amount of the loss, refused to do so, and, as stated in the report (pp. 492–3):

> "Not pretending that the complainant was not entitled to it according to the contract between them, but that, from neglect to obtain an assignment of the policy, the complainant was without remedy, and that he, Baxter, had obtained an advantage which he would not relinquish. After several attempts on the part of the complainant to adjust the matter with Baxter, which failed, the complainant gave notice to the Insurance Company of his equitable claim to the amount due upon the policy, who thereupon refused to pay it either to the complainant or Baxter without being, for the sake of a legal discharge, compelled so to do. Baxter then assigned the policy to a creditor, one William Dwyer, who had, previous to receiving the assigment, notice of the claim of the complainant."

The mortgagor had actually insured the premises himself, but had not aliened the land, thus raising no question as to the effect of his covenant. But he undertook, *after the fire*, to assign *the policy itself*, which he had agreed to take out for the benefit of the mortgagee and had actually taken out, over to another in fraud of the mortgagee's right.

The case of Masury *vs.* Southworth, 9 Ohio St. 341, the last case cited by the court below (App. to Rec., p. 16), was, like Vernon *vs.* Smith, 5 Barnew. & Ald. 1, an action by the assignee of the lessor against an assignee of the lessee for breach of the contract to insure. The lease contained covenants to build, keep in repair and keep insured, and were part of the consideration. The thing assigned was not the land or an equity of redemption therein but a *lease*. The contract of letting, *containing the covenants of both parties*, was the subject of the assignment but even in that case the court said (p. 349):

> "A covenant to run with the land *must have for its subject-matter something which sustains the estate and the enjoyment of it* and is therefore beneficial both to lessor and lessee. A covenant to insure which had for its object the *benefit of the lessor only, as where the money paid in the event of a loss would go to him*, has been regarded as collateral; but if the money is to be applied to repair or rebuild, then it is, in its character like a covenant to repair which may run with the land."

It is respectfully submitted that the cases cited in the opinion of the court below, do not support its position and that its conclusions are in direct conflict with both principle and precedent.

II.

The Court Erred in Not Remanding the Cause to the Court Below for Further Proceedings.

This cause came on first to be heard in the Supreme Court of the District at the March term, 1898, of the special term in equity, and was then disposed of by a final decree (Rec., pp. 74–76). From this final disposition of the case both parties appealed to the Court of Appeals (Rec., p. 76), and the appeal was docketed in that court May 5, 1898

(Rec., p. 79). On the 28th of February, 1899, that court reversed the decree upon both appeals and directed that "the cause be remanded for further proceedings" (App. to Rec. 18)

The cause being remanded for further proceedings, in accordance with the mandate of that court, the trustee proceeded to the taking of additional testimony, and took the depositions of witnesses in its behalf (Rec., pp. 81–108).

Subsequently, on motion of the complainant, trustee, the cause was referred to the auditor, with direction to consider the evidence on file and such additional evidence as should be adduced by the parties (Rec., p. 108), and under this reference the complainant, trustee, in November, 1899, offered further testimony before the auditor (Rec., p. 118).

Subsequently, on motion of complainant, trustee, on February 7, 1900, the former order of reference to the auditor was amended and enlarged so as to increase the scope of his inquiry and report (Rec., p. 109).

It must be observed that the reference to the auditor as originally made, and as enlarged by the amendment, was limited in its scope. It was simply—

> "to state the account of complainant, as trustee under the deed of trust . . . and to ascertain and report the amount of the indebtedness still due upon the said bonds under said trust" (Rec., p. 109).

It did not authorize the auditor to report the proper distribution of any fund in the hands of the trustee, nor to make any allowances to the appellants for anything not a payment on the bonds.

The auditor filed his report under the two orders of reference on March 23, 1900 (Rec., p. 109).

The complainant, trustee, took no further testimony, but it did not announce its case as closed; nor was any time limited by the court within which either party was to close its testimony.

On April 24, 1900, the complainant, trustee, caused an order to be entered to calendar the cause for hearing at the

May term of the Supreme Court. No notice of this order was given to defendants (appellants here), as specifically required by the rules, and the appellants had no knowledge or notice of the said proceedings until May 9, 1900 (Rec., p. 120), and on May 14, 1900, defendants moved to have the case stricken from the calendar (Rec., pp. 119–120). The calendaring of the case for hearing at the May term, and the consideration and decision of the same at that term against the objection of appellants was plainly in direct violation of the rule of court and of the rights of the appellants, and was without authority.

Equity rule sixty-four of the Supreme Court provides as follows:

> "No cause in equity shall be set down for hearing unless the same *be at issue and ready for hearing*, or be properly set down for hearing on bill and answer or bill and answer and replication; and every such cause may be ordered by either party or his counsel to be placed upon the calendar, *provided* such order be given to the clerk and *notice thereof to the opposite party* at least five days, exclusive of Sundays, previous to the first day of the next term. Any cause once properly set down for hearing and placed upon the calendar, if not disposed of by the court, shall remain upon the calendar in its proper order unless otherwise directed by the court."
>
> Rules of April, 1898, p. 68.

In their motion to strike the case from the calendar and for leave to take testimony in their behalf, the defendants, appellants here, set forth the fact that the cause had been improperly calendared and without notice to them, as required by the rule, and pointed out the matters as to which the defendants desired to offer evidence (Rec., pp. 119, 120).

The court, however, proceeded to hearing and final decree (Rec., pp. 121, 123).

The Court of Appeals sustained this action of the court below, saying:

> "If there was irregularity in the matter of calendaring the cause, which is by no means certain, it was waived or cured by the appearance of the appellants in the argument of the cause and their participation therein" (Rec., p. 129).

In this statement the court below erred as to the fact. The appellants did not participate in the argument and the record does not so state. The final decree merely recites that the cause "was argued by counsel" (Rec., p. 121), but it does not say by counsel *for appellants*. As matter of fact counsel for the appellee only argued the case and appellants' counsel did not participate in the argument or take any part in the hearing beyond being present and urging their objection to any hearing at that time.

But it is submitted that even if the record did show that counsel for appellants had participated in the argument or hearing of the case and such had been the fact, that circumstance would not have operated as a waiver of appellants' rights.

The objection presented a question going to the jurisdiction of the Supreme Court of the District, in special term, to hear the case, and that objection having been properly made, the appellants, had they seen fit to do so, were then at liberty to proceed with the hearing without waiving their objection, for so this court has repeatedly ruled.

In Harkness *vs.* Hyde, 98 U. S. 476, this court, by Mr. Justice Field, says (p. 479):

> "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. *He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality,* that the objection is deemed to be waived."

In Southern Pacific Co. *vs.* Denton, 146 U. S. 202, this court, through Mr. Justice Gray, says (p. 206):

> "Neither the special appearance for the purpose of objecting to the jurisdiction, *nor the answer to the merits after that objection had been overruled*, was a waiver of the objection—"

and repeats the foregoing language quoted from the case Harkness *vs.* Hyde.

In Mexican Central Railway *vs.* Pinkney, 149 U. S. 194, this court again approved this doctrine, saying (p. 209):

> "In Harkness *vs.* Hyde, 98 U. S. 476, it was held by this court that illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; *nor after such motion is denied by his answering to the merits.* Such illegality is considered as waived *only* when he, *without having insisted upon it*, pleads in the first instance to the merits."

It is respectfully submitted that the complainant trustee, having taken one year from the remanding of the cause in which to submit its evidence, could not, without announcing its evidence as closed and without notice to the defendants, cut off their right to offer testimony on their behalf by calendaring the cause for hearing without notice and in violation of the express rules of the court, which is precisely the effect of what was done.

III.

The Court Erred in Decreeing a Sale Pending the Litigation in the Potomac Flats Case.

When this case was disposed of on the first appeal the Court of Appeals said:

> "The sale of the property, however, under any decree that may be passed, should not be allowed to be made until after the case of *Morris and Others* v.

> *United States*, known as the Potomac Flats Case, now pending in the Supreme Court of the United States, shall have been decided; for otherwise the sale of the property made subject to the final decision of that case, could not be other than a mere speculation, and would most likely result in obtaining nothing more than a mere nominal sum" (App. to Rec., p. 18).

That decision was rendered on February 28, 1899 (App. to Rec., p. 2), and the decision of the "Potomac Flats Case" by this court was rendered May 1, 1899 (174 U. S. 196).

The decree of the Supreme Court of the District authorizing the sale of the property was entered May 15, 1900 (Rec., p. 121), and affirmed by the Court of Appeals January 9, 1901 (Rec., p. 132).

In its opinion, affirming this decree of sale notwithstanding the fact that the litigation in the Potomac Flats Case was still pending and the interest of the appellants still unascertained, the Court of Appeals says (Rec., p. 130):

> "After being remanded, however, the Potomac Flats Case seems to have been consigned to the limbo of dead issues, and *no attempt, at all events no serious attempt, seems ever to have been made by anyone to resuscitate it* from its condition of suspended animation."

After further observations upon the conduct of these appellants in the Potomac Flats Case, the Court of Appeals says (Rec., pp. 130–131):

> "The direction in our former opinion in this case, that there should be no sale until after the determination of the Potomac Flats Case, was manifestly intended for the benefit of all the parties to this cause, and most of all for the benefit of the appellants. But if the appellants *by their continued inaction refuse to procure the desired determination of their interest*, and at the same time refuse to put the appellee in such position as that it may act in its place in that case, it can not thereby be permitted to defeat the just rights

> of the appellee. And it can not complain if the appellee is thereby remitted to the speedy execution of the mortgage to which it is entitled. We have no doubt that, *if the appellants persist in their course of inactivity in the Potomac Flats Case*, there will be no difficulty in substituting a purchaser at a sale under a decree in this case in its place and stead, to ascertain the value of the interest in controversy."

It is respectfully submitted that the assignee, who is in responsible charge of the rights of the appellants in the Potomac Flats Case is not fairly subject to the censure implied in these observations of the court below.

The record is absolutely silent as to what had or had not been done by the appellants in the Potomac Flats Case since the decision by this court, and the reason there is no such evidence is that the appellants were denied the opportunity for offering any by the calendaring and hearing of the cause in violation of their rights and of the rules of the Supreme Court of the District.

It is not the fault of the appellants that the complainant trustee was not a party to the Potomac Flats Case. It had the same right and opportunity to be made a party to that proceeding that appellants had, and in that event could have been one of the appellants to this court in that case. It preferred, however, not to avail itself of that right and opportunity, but to leave the burden and cost of that litigation wholly to these appellants.

The decision of this court in the Potomac Flats Case defeated the titles of all parties whomsoever to the property the subject of the mortgage, but saved *to the appellants in that case* the right to recover unascertained and undefined compensation for improvements made by them within the *locus in quo* which could only be ascertained and made definite through the further proceedings prescribed by this court.

The only thing, if anything, to which the complainant,

trustee, can have right by virtue of its mortgage would be the ultimate recovery in these proceedings. A sale of that possible, ultimate recovery at auction under a foreclosure sale could not be other than a speculative sale, while the mortgagor and owner of the equity of redemption are manifestly entitled to have applied to the mortgage debt whatever may ultimately be recovered in that proceeding.

The suggestion, in the opinion of the court below (Rec., p. 130) that the recovery in those proceedings may not be sufficient to satisfy the claims of the mortgagee and other creditors, and that, therefore, the—

> "Ice Company therefore has probably no motive of self-interest to move for the ascertainment of the value of its interest in the property in controversy;"

ignores the fact that the appellants are interested in securing in that proceeding, as a credit on the bonded indebtedness, if for no other purpose, the largest possible sum, and that they are fairly entitled to that advantage.

IV.

The Court Erred in Not Requiring the Complainant Trustee to make Contribution to the Costs of the Litigation in the Case of the United States v. Morris, known as the Potomac Flats Case, and in Not Remanding the Case to the Supreme Court of the District for that Purpose.

The act of Congress approved August 5, 1886 (24 Stat. 335), entitled "An act to provide for protecting the interests of the United States in the Potomac River Flats, in the District of Columbia," made it the duty of the Attorney General to institute, as soon as may be, in the Supreme Court of the District, a suit against all persons and corporations who might have, or pretend to have, any right, title, claim or interest in any of the land or water described in the act,

"for the purpose of establishing and making clear the right of the United States thereto."

The third section of the act made the decree in said suit final and conclusive upon all parties to the suit and also upon all persons and corporations—

> "who shall fail, after public notice as hereinbefore in this act provided, to appear in said court and litigate his, her or its claim, and they shall be deemed forever barred from setting up or maintaining any right, title, interest or claim in the premises."

The property involved in this proceeding was acquired by the Ice Company in December, 1889 (Rec., pp. 24–25), and the mortgage given to the trustee on the same day (Rec., pp. 21–29), and at the time was claimed by the United States in what is known as the Potomac Flats Case (Rec., p. 8). So that both mortgagor and mortgagee took whatever rights they obtained subject to that act of Congress and the proceedings instituted thereunder.

The complainant trustee never appeared in said cause, never took any part in said proceedings, nor ever did anything to maintain the title thereto, nor bore any part of the costs thereof, though requested to do so, and the costs and labor thereof were wholly borne by the assignee (Rec., pp. 43, 48, 120).

By the decree in said Potomac Flats Case, passed October 17, 1895 (Morris *vs.* United States, 174 U. S. 196) the title of the United States was declared to be absolute as against all the defendants to that cause, and—

> "against all persons whomsoever claiming any rights, titles or interests therein who have failed to appear and set forth and maintain their said rights, titles or interests as required by said act of Congress."
>
> 174 U. S. 216.

The effect of this decree was, as alleged in the bill, practically to destroy the property embraced in the mortgage (Rec., p. 8).

The assignee of the Ice Company prosecuted an appeal from said decree to this court (174 U. S. p. 218) and upon the hearing the said decree was affirmed, but the cause was remanded to the Supreme Court of the District for further proceedings, this court saying (p. 291):

> "It is not disclosed in this record whether it is the design of the Government, on taking possession of the wharves and buildings belonging to the appellants, to continue them in the use of the public or to supersede them by other improvements. Whatever may be the course pursued in that respect, it should not deprive the appellants of the right conferred upon them by the act of Congress to have the value of their respective rights, titles, interests or claims ascertained and awarded them.
>
> "As to the method to be pursued in valuing property of so peculiar a character, the cases of The Monongahela Nav. Co. *vs.* United States, 148 U. S. 312, and Hetzel *vs.* Baltimore & Ohio Railroad, 169 U. S. 26, may be usefully referred to."

It is thus seen that all that remains of the property embraced in this mortgage is what may be recovered in the further prosecution of that proceeding, *by the assignee*, as the judgment of this court only remanded the cause in so far as the "*appellants*" then before it were concerned.

As the complainant, trustee, took its mortgage during the pendency of that proceeding, with full knowledge that the title was in litigation, and without any covenants to defend the title on the part of the mortgagor, the mortgagor and the assignee of its equity of redemption were under no obligation to conduct said litigation for its benefit; but if the result of the assignee's labor and expense in the original proceedings, in the prosecution of the appeal and in the further proceedings, are to enure to the benefit of the trustee by virtue of its mortgage and the foreclosure sale thereunder, it is but just and reasonable that the trustee should bear a part of such expense in proportion at least to the advantage it derives therefrom.

V.

The Court erred in not Dismissing the Bill Because of the Inequitable Abuse of its Trust by the Trustee.

An examination of the record will show that the complainant, trustee, has so inequitably abused its trust as to forfeit all right to relief in a court of equity.

It is to be remembered that two properties were conveyed by the mortgage—one in Bangor, Maine, and the other in the District of Columbia (Rec., pp. 23, 24), and that by the action of the trustee, the right of the assignee to the equity of redemption in the property in Bangor was defeated (Rec., pp. 43–4, 48–9, 91, 92).

It thus had a lien upon two properties, to only one of which the assignee had right of recourse and it was therefore bound to exhaust its rights in the Maine property before resorting to that in Washington. And in this connection it was bound to proceed in fairness to both mortgagor and mortgagee, and to pursue, strictly, the powers given by the deed of trust.

In the fifth paragraph of its bill which was filed in March, 1896 (Rec., p. 1) the complainant, trustee, makes the following averments (Rec., pp. 4–5):

> "In pursuance of such direction and *in strict conformity with the terms of the power of sale contained in said mortgage, said trustee advertised for sale and sold the property* in said mortgage embraced and described *at public auction*, at Bangor, Maine, on September 8th, 1894, to a committee acting for said bondholders as follows: The portion of said real estate and personal property and property rights situate in the State of Maine, *for the sum of fourteen thousand dollars.*
>
> . . . . . .
>
> "That the said committee have never perfected their purchase of the said Maine property and no deed has

passed to them thereunder, but that *they tender themselves ready and plaintiff is ready on its part to comply with the terms of said sale, and that the same is in effect completed* and that *there will be realized therefrom*, after deducting the trustee's commissions and certain necessary disbursements and expenses and the reasonable costs and expenses of said sale in conformity with the provisions of said trust, *the sum of nine thousand one hundred and seventy-three dollars and sixty-eight cents* ($9,173.68) to be credited upon the residue unpaid of said bonded indebtedness and interest."

Here was a positive averment by the trustee, under the oath of its secretary, George B. Canney (Rec., p. 11), that in September, 1894, it had, *in strict conformity* with the power of sale in the mortgage, sold the Maine property *at public auction for fourteen thousand dollars*, and that there would be distributable therefrom to the bondholders, as a credit on the mortgage debt, the *sum of nine thousand one hundred and seventy-three dollars and sixty-eight cents.*

The basis of the Trustee's bill is thus seen to be that there has been a valid, public sale, at auction, of the Maine property in strict conformity with the powers under the trust, the proceeds of which were insufficient to satisfy the mortgage debt and the Trustee therefore had the right to have recourse to the Washington property.

It was for the deficiency arising from that sale that this foreclosure was sought and it is obvious that if the alleged sale of the Maine property was invalid, the bill in its present form could not be sustained.

The answers of the defendants deny all knowledge of this alleged sale, and demand strict proof thereof (Rec., pp. 40, 45), thus putting in issue the basic principle of the bill.

The facts with respect to said alleged sale as established in this record, not by controverted testimony, but by the evidence in behalf of the Trustee itself are, that there was no such sale as is alleged in the bill, but only a pretended and fictitious auction sale; that the property was secretly sold at

at *private* sale in March, 1897, more than a year after the filing of the bill, for a much larger price; that instead of receiving *fourteen thousand dollars*, through the administration of the trust it received *twenty-one thousand eight hundred and thirty-three dollars and seventeen cents* (Rec., pp. 115, 116); that instead of having *nine thousand one hundred and seventy-three dollars and sixty-eight cents* for credit on the mortgage debt, it had *sixteen thousand three hundred and forty dollars and forty-two cents* (Rec., pp. 116, 117).

A very full and lucid statement of the transactions of the trustee will be found in the report of the auditor (Rec., pp. 109–115), and in his statements of account, schedules A and B (Rec., pp. 115–118).

The court's careful consideration of this report is earnestly solicited since it is the only judicial analysis contained in the record of the facts relating to this extraordinary transaction.

By the testimony taken in behalf of the trustee, before the first hearing it appeared that the trustee had duly advertised all the real estate covered by the deed of trust for sale, to take place in Bangor, Me., on the 9th day of May, 1894; and in said advertisement it was stated that the terms and conditions of said sale would be announced by said trustee at the time and place of the auction sale (Rec., pp. 59, 60).

The sale was postponed to the 8th of June, 1894 (Rec., p. 59), and again postponed to the 8th of September, 1894 (Rec., pp. 59, 60), of which due notice was given.

On the last named day a pretended auction sale was held in a room of a hotel in the city of Bangor, Maine, at which the property in Washington was first offered for sale, and then the property at Hampden. The only terms of sale announced at the auction were those contained in a certain paper writing, marked Complainant's Exhibit 1 (Rec., p. 60), which paper was read at the sale, and was the only announcement of the terms of sale made at any time or place (Rec., pp. 53, 69). These terms were:

"One-third of the purchase-mony is to be paid in cash, one-third in one year with interest, and one-third in two years with interest, interest to be payable semi-annually; the payments in one and two years to be secured by mortgages upon the property sold, with proper provisions in said mortgages to insure the prompt payment of taxes on the said property, and that the buildings on said property shall be kept covered by insurance to at least the amount due and secured by the mortgages; loss, if any, to be payable to the mortgagee to the extent of his interest, and that the buildings be kept in suitable state of repair" (Rec., p. 60).

These terms were not fixed by the trustee, but by Edward L. Stewart, J. B. Huckins and John Miller, a committee representing the holders of some of the bonds secured by the mortgage (Rec., pp. 52, 60).

No conveyance was ever made by the trustee of either property to the said pretended purchasers at any time, nor did they ever have possession of either piece of property.

No money was ever paid or notes given by the alleged purchasers at the auction sale for either property, nor was any attempt made in any way to comply with any of the terms of sale, nor was any credit of principal or interest made upon any of the bonds secured by the mortgage until March, 1897, after the private sale to the Consolidated Ice Company, when a credit of thirty-nine per cent. was made upon said bonds (Rec., pp. 66, 67).

The trustee retained possession of the property in Maine and rented it for twenty-four hundred dollars a year (Rec., p. 53), and collected therefrom in two years forty-eight hundred dollars (Rec., p. 71), and in March, 1897, one year after this bill was filed, while the cause was pending and testimony was being taken upon the issues, without any notice, John Miller sold the Maine property at private sale and the trustee conveyed the same to the Consolidated Ice Company for sixteen thousand five hundred dollars cash (Rec., pp. 69, 70).

A partial statement of disbursements and claims was given by the trustee containing certain claims for disbursements from March 22, 1894, to November 8, 1895 (Rec., pp. 55–57), and in the testimony of George B. Canney, secretary of the trustee, given in November, 1896, it is stated that the trustee makes a claim of two thousand dollars, under the indefinite statement "for anything that it will go in for" (Rec., p. 54). He also states that the company will make a further claim for an additional allowance against the mortgagor (Rec., p. 55).

After the cause had been remanded by the Court of Appeals upon the first hearing, further evidence was taken in behalf of the Trustee (Rec., pp. 81–108, 118), which is carefully analyzed in the Auditor's report (Rec., pp. 109–115).

From this evidence it appears that the Maine property, together with ice and tools, was sold for the lump sum of $20,000 (Rec., pp. 91, 102), and by direction of the bondholders' committee; $3,500 of that was paid to the Penobscot Ice Company for the ice and tools (Rec., p. 103), with the assent of the Assignee appointed in Maine (Rec., p. 91).

None of the parties to the alleged sale of September 8, 1894, treated that transaction as a sale. The account of the Trustee, G. B. C. No. 29—Nos. 1 and 2 (Rec., pp. 104–106) show that the Trustee continued to treat the American Ice Company, the mortgagor, as owner, debiting and crediting it as such from March 22, 1894, to February 27, 1897, including rent collected and taxes and insurance paid after the alleged sale, while the only account with the bondholders of any proceeds of sale or rights thereunder begins with February 27, 1897, being "G. B. C. No. 29. No. 3" (Rec., pp. 106–7). The only credits to this account are the sale to the Consolidated Ice Company, March 5, 1897 (Rec., p. 107) and returns of premiums of unexpired insurance (Rec., p. 107) paid by the trustee in 1896 and 1897, after the alleged sale in 1894, and charged against the mortgagor in the account with it (Rec., p. 106).

It is thus obvious that the alleged sale at auction in September, 1894, the basis of the Trustees' bill was a mere ruse by an apparent formal execution of the trust to extinguish the equity of redemption of the mortgagor, and substitute, for the public sale by the Trustee, this private sale conducted wholly by three bondholders, the trustees servilely obeying their directions in all things.

Such a pretended sale it is submitted can not operate as a valid execution of the trust as the rule is that a power of sale under a mortgage must be exercised strictly as prescribed in the mortgage deed.

Indeed, so strictly has the rule been applied that even the omission to comply with a provision prescribing acts to be done *after* the sale will render the sale void.

In Smith *vs.* Provin, 4 Allen, 516, which was a bill to redeem the mortgagor gave the mortgagee a power of sale but provided that the mortgagee selling—

> "should make affidavit of his proceedings under the power and that the affidavit should be so made and recorded in the registry of deeds for the county of Hampden *within one year after the sale.*"

The mortgagee made the sale, but did not make and record the affidavit until *three* years later.

The court held the sale to be a nullity, saying (p. 518):

> "The mortgage to Gillett was dated March 13, 1856, and contained a power of sale, in case of the default of payment of a certain sum of money therein named. Such power of sale may be annexed to a mortgage and a sale made in strict conformity to its provisions will bar the equity of redemption and convey a good title to the purchaser. It is by force of this power of attorney and proceedings under it that the defendant Provin claims an indefeasible title in the premises now sought to be redeemed. The allegation on the part of the plaintiff is, that the conditions annexed to the power of sale have not been complied with. The defect particularly assigned is,

> that the affidavit required to be made by the party making such sale, and containing a statement of a compliance with the requirements of the deed in that behalf, was not made and recorded in the registry of deeds for the County of Hampden within one year after the sale. It is admitted by the answer of the defendants that no such affidavit had been made and filed for record in the registry of deeds prior to April 21, 1862, nearly three years after the sale and long after the filing of the present bill. *There was, therefore, a failure to comply with the conditions annexed to the power of sale, and the sale must be treated as a nullity.* This court has held the rule very strictly as to mortgage sales under power of attorney. Roarty *vs.* Mitchell, 7 Gray, 244."

In this case it is to be observed that the Trustee was not only constituted the Trustee by the mortgagor to make the sale, but for said purpose is thereby "constituted irrevocably the attorney of said American Ice Company" (Rec., p. 26), and expressly exonorated from any liability for neglect, mismanagement, or misfeasance of any of its agents in relation to selling the property (Rec., pp. 27–28).

With reference to this sale in Maine of the Maine property, the Court of Appeals in its opinion on the first appeal said (App. to Rec., p. 17):

> "With respect to the question made as to the validity of the proceedings of the Trustee in selling or attempting to sell the property situate in Maine, and the application of the proceeds of that sale, we shall not go into any extended examination. There is no fraud charged and no such irregularities shown as furnish the foundation for impeaching the fairness and good faith of the sale that was ultimately made."

It is to be observed, however, that the appellants were not complainants, but defendants answering the bill, and it is not the office of an answer to charge fraud, especially where, as here, the appellants denied all knowledge on the subject.

The appellants could not obtain affirmative relief from said sale in this suit by cross-bill, since a bill for that purpose would have necessitated new parties—the alleged purchasers at the first sale.

But in view of the fact that the Trustee made that sale the basis of its suit, and no decree for a forclosure in this case could be made until the balance of the debt resulting from that sale was fixed, the complainant was bound to establish the absolute validity of that sale or to abandon it altogether.

And while it may be true that in the case then before the Court of Appeals, there were "no such irregularities shown, as furnish the foundation for impeaching the fairness and good faith of the sale" the facts subsequently established by the complainant in its attempt to state the account, did show such irregularities, and the fact that the bill claimed a sale, in strict conformity with the terms of the trust for *fourteen thousand* dollars and a balance of a little over *nine thousand* dollars, and the proof adduced, after the first appeal showed a fund of nearly *twenty-two thousand* dollars to be accounted for, and a balance of over *sixteen thousand* dollars, shows that those irregularities were fraudulent in their tendencies whether so designed or not.

It is respectfully submitted, therefore, that the bill as framed should have been dismissed unless the complainant should have elected to abandon its pretended sale of September, 1894, and to bring in the Maine property for resale under this or independent foreclosure proceedings.

It is respectfully submitted that the decree of the court below should be reversed.

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Counsel for Appellants.

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